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No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The United States advocates a standard for reviewing district court decisions to depart from the Sentencing Guidelines that would eliminate the only realm of traditional sentencing discretion preserved for sentencing judges under the Sentencing Reform Act (the "Act"). The Court should reject the de novo standard proposed by the United States and hold that departure decisions are subject to deferential, abuse-of-discretion review.

Although both Congress and the Sentencing Commission quite clearly intended to afford district courts discretion to depart from the Guidelines' sentencing range in "unusual" cases, *see, e.g.*, U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b), the United States contends that the courts of appeals have broad, plenary authority to overturn departure decisions even where, as here, the district court relies on a factor (victim provocation) that the Sentencing Commission has itself identified as a proper ground for departure. The United States' position is plainly contrary to the language and legislative history of the Act and cannot be squared with the express policy statements of the Sentencing Commission that, except for certain explicitly prohibited factors, the Commission did "not intend to limit the kinds of factors . . . that could constitute grounds for departure in an unusual case." *Id.*

The United States' argument that the statutory language supports its de novo review standard is at least audacious. In essence, it contends that because the Act expressly requires deferential review of the "district court's application of the guidelines to the facts," it must have intended de novo review of decisions to depart from the Guidelines. U.S. Br. at 22-23. However, any reasonable interpretation of the Act reveals congressional intention that

district court decisions, including departure decisions, involving application of the Guidelines in particular factual settings require deferential review. Any other interpretation of the Act, particularly in light of its other provisions, would be highly anomalous. Absent a clear congressional expression to the contrary, departure decisions are quintessentially discretionary judgments involving application of the Guidelines to the peculiar facts of a particular case.

The United States' interpretation of the legislative history is equally incongruous and clearly incorrect. The United States relies upon the Senate Report in advocating de novo review of district court departure decisions, but that Report states in no uncertain terms that Congress intended to preserve for the district courts a reservoir of discretion to ensure the "thoughtful imposition of individualized sentences" and to impose an "obligation" on the sentencing judge to consider departure "outside the guidelines." S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235. The United States' reliance upon the 1988 amendment to the appellate review provision of the Act, U.S. Br. at 26-27, is misplaced because that amendment *added* the requirement that appeals courts give "due deference" to a district court's application of the Guidelines to the facts. The amendment thus reflected congressional sentiment explicitly favoring deferential, not de novo, review of decisions regarding when, how and to what extent to apply the Guidelines.

The United States' contention that "institutional advantages" support de novo review is refuted by 200 years of tradition in this country. It is also squarely inconsistent with the intricate sentencing scheme established by the Act because it would substitute federal appeals courts for the Commission as the predominant expositors of federal

sentencing policy concerning departures. This Court has long recognized that the sentencing judge is in a far better position and is more institutionally suited than an appeals court to evaluate the unique circumstances of a particular case to determine the proper punishment. Neither the Act nor the Guidelines alter that reality. And "except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams* v. *United States*, 503 U.S. 193, 205 (1992) (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.160 (1983)).

Finally, the United States asserts that the "statutory purposes" of the Act support de novo review because Congress intended to "cabin" sentencing discretion and thereby eliminate sentencing disparities. But Congress' other explicit statutory purpose was to "maintai[n] sufficient flexibility to permit individualized sentences," 28 U.S.C. § 991(b)(1)(B), and it therefore expressly approved discretionary departures in unusual and atypical cases. Abuse-of-discretion review of such departures is fully consistent with, and required by, this latter goal of the statute.

In short, all of the factors identified by the United States as relevant to the proper standard of review militate in favor of abuse-of-discretion review of district court departure decisions. The district court here acted well within its discretion in departing downward, and its sentencing decision should be reinstated by this Court.

ARGUMENT

A. Abuse Of Discretion Is The Proper Standard Of Review

As demonstrated below, the considerations identified by the United States as relevant to the determination of the proper standard of review — the statutory text, legislative history, institutional advantages and statutory purposes — all point in the direction of abuse-of-discretion, not de novo, review.

1. Statutory Text. Despite the absence of *any* reference in the Act to de novo appellate review of Sentencing Guideline departures, the United States boldly declares that "[t]he text of the appellate review provisions strongly supports de novo review." U.S. Br. at 22. That position is simply not supported by any fair reading of the statutory text.

a. The Act's appellate review provisions say nothing about de novo review. Rather, the Act's *only* provisions concerning the applicable standard of review expressly require deference to district court sentencing decisions. The Act requires that courts of appeals "shall accept" district court factual findings "unless they are clearly erroneous" and "shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e). The United States contends that Congress' "express provision for a measure of deference on those two appellate issues strongly implies" (U.S. Br. at 22) that Congress intended to require de novo review of "the threshold legal question" as to whether a ground for a departure is a permissible one. But "application of the guidelines to the facts" inescapably includes consideration of whether and when to depart from the Guidelines. It would have been most anomalous for Congress to have

required deferential review of "application of the guidelines to the facts," but de novo review of the statutorily required "find[ing]" that there exists a circumstance "that should result" in a departure from the Guidelines. 18 U.S.C. § 3553(b).[1]

b. The United States' contention that a district court's decision that particular factors warrant a departure from the Guidelines is an exclusively legal question, U.S. Br. at 22-23, is incorrect. Sentencing departures inevitably involve fact-predominant mixed questions of law and fact, *i.e.*, "application of the guidelines to the facts." 18 U.S.C. § 3742(e). For example, the 5-level departure for victim misconduct in this case resulted from the district court's application of Guideline § 5K2.10, p.s. to the unique facts of Mr. King's unlawful conduct and resistance to arrest. Moreover, this departure as well as the 3-level departure based upon a combination of other factors involved an

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[1] If anything, Congress' failure to mandate de novo review supports the inference that Congress intended deferential not de novo review of departure decisions, especially in light of the fact that prior to enactment of the Act, district court sentencing decisions were virtually unreviewable on appeal. *See Williams*, 503 U.S. at 205 (unless specifically directed to do otherwise by statute, courts of appeals must give traditional deference to district courts concerning sentencing decisions); Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. Cal. L. Rev. 607, 636 (1992) ("Congress could easily have used the phrase 'de novo' or 'plenary' if it had wanted to confer such broad power. Certainly its use of the phrase 'clearly erroneous' shows that Congress knew how to use the precise wording for a standard of review. Indeed, the phrase 'due deference' seems incompatible with the nature and scope of de novo review.").

inquiry as to whether the extraordinary circumstances (facts) of this case made it so unusual as to fall outside the "heartland" of cases to which the Guideline for excessive force, § 2H1.4, applies. These departures are precisely the type of "application[s] of the guidelines to the facts" of a specific case that must be accorded "due deference" under the Act.

c. The United States argues that de novo review is appropriate in light of the Act's provision that courts only consider "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" in "determining whether a circumstance was adequately taken into consideration" by the Commission in formulating the relevant Guidelines. *See* U.S. Br. at 23. That statutory directive, however, in no way mandates the sweeping plenary role for appellate courts that the United States advocates. If anything, it suggests the reverse.

Except for a few specifically prohibited factors, *see* Pet. Br. at 26 n.11, the Commission did "not intend to limit the kinds of factors, whether or not mentioned anywhere in the guidelines, that could constitute grounds for departure in an unusual case," U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b), and "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure," *Burns* v. *United States*, 501 U.S. 129, 136-37 (1991); *see also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). To be sure, by restricting courts to certain written Sentencing Commission materials in determining whether a factor has been "adequately taken into consideration," the Act requires courts to interpret the Guidelines, but it also thereby

sharply limits the sources on which a court may base a finding that it may not depart from the Guidelines. If the text of these materials does not reveal that a particular factor has been adequately considered by the Commission, then the district court has "legal freedom," if not the duty, to consider that factor in determining whether the facts of a case make it so unusual as to warrant a departure. U.S.S.G. Ch. 1, Pt. A, intro. comment. (4)(b); *see United States* v. *Rivera*, 994 F.2d 942, 949 (1st Cir. 1993). Moreover, even where that textual analysis reveals that "the reason for departure is taken into account in the guidelines," a district court still has discretion to depart "if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate." U.S.S.G. § 5K2.0, p.s.[2] Thus, this inquiry will necessarily require the district court to "appl[y] . . . the

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[2] According to the United States, de novo appellate review is appropriate in light of the Act's requirement that the district court find that an "aggravating" or "mitigating" circumstance "should result" in a departure. *See* U.S. Br. at 24-25. However, prior to the Act, district courts regularly made discretionary judgments as to whether aggravating or mitigating factors justified a longer or shorter sentence than what would otherwise be imposed. *See, e.g., United States* v. *Neyens*, 831 F.2d 156, 160 (7th Cir. 1987) (no abuse of discretion where "district judge was aware of the mitigating circumstances and in fact considered them"); *United States* v. *Catch The Bear*, 727 F.2d 759, 761 (8th Cir. 1984) (sentence reviewed only for abuse of discretion, and "[t]he sentencing court may consider aggravating as well as mitigating factors in setting a sentence"). The codification of this practice hardly signals a congressional intention to establish a new and rigorous plenary standard of appellate review for departure determinations.

guidelines to the facts" to decide whether a factor warrants departure.

d. The United States contends that courts must go beyond the Guidelines and Sentencing Commission positions and consider general notions concerning "the purposes of sentencing" described in 18 U.S.C. § 3553(a) to decide whether a particular factor is a proper basis for departure. *See* U.S. Br. at 24-26, 37. That process, it contends, goes beyond the evidence and is a purely legal determination. But the Act's broadly worded directives inevitably are dependent on application of such principles to the particular circumstances of the case. These decisions do not readily lend themselves to the articulation of uniform legal standards for sentencing departures. Case-specific inquiries such as "the need for the sentence imposed to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C), "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," *id.* § 3553(a)(2)(D), or "to provide just punishment for the offense," *id.* § 3553(a)(2)(A), are not the types of issues that call for or benefit from de novo appellate review.

e. The United States also relies on the statutory command that the district "'court *shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [18 U.S.C. § 3553(a)(2)]'." U.S. Br. at 24 (quoting 18 U.S.C. § 3553(a)) (emphasis in Brief for the United States) That statutory provision, however, only underscores that it is the *district court*, not the court of appeals, that has the obligation to impose a sentence consistent with § 3553(a)(2). Indeed, the Act explicitly authorizes a departure if the district "court *finds* that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by

the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b) (emphasis added). These provisions thus "emphasize[ ] the fact that the determination is for the district court to make, and . . . suggest[] some deference to the district court on appeal." *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988) (appellate deference suggested by statutory provision stating that attorney's fees are to be awarded "unless the [district] court finds that the position of the United States was substantially justified").

f. Finally, even if in some cases a district court's findings concerning a departure technically may involve a "legal issue," it does not necessarily follow that Congress intended for de novo appellate review. "From the given that the issue is not one of fact, one can confidently conclude that Congress would not have expected, on the basis of the case law, that a clearly-erroneous standard of review would be applied, but not that it would have expected review de novo rather than review for abuse-of-discretion." *Pierce*, 487 U.S. at 558 n.1. Indeed, this Court has recognized that abuse-of-discretion appellate review may be appropriate even though the type of district court ruling at issue may turn on resolution of a pure question of law. *See id.* at 560 (adopting abuse-of-discretion standard for reviewing attorney's fee awards under the Equal Access to Justice Act, while acknowledging that "[i]n some cases, such as the present one, the attorney's fee determinations will involve a judgment ultimately based upon evaluation of the purely legal issue governing the litigation"); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("[A]n appellate court should apply an abuse-of-discretion standard in reviewing *all* aspects of a district court's Rule 11 determination.") (emphasis added).

2. Legislative History. The United States maintains that the discussion of appellate review in the Senate Report supports its argument for de novo review. *See* U.S. Br. at 26-27. That Report, however, emphasized that the Sentencing Guidelines were *not* intended to "remove all of the [district] judge's sentencing discretion." S. Rep. No. 225, *supra*, at 51, *reprinted in* 1984 U.S.C.C.A.N. at 3234. The Report states that "the sentencing judge has an *obligation* to consider *all* relevant factors in a case and *impose a sentence outside the guidelines* in an appropriate case." S. Rep. No. 225, *supra*, at 52 (emphasis added), *reprinted in* 1984 U.S.S.C.A.N. at 3235.

The United States' citation of the legislative history of the 1988 amendment to the appellate review section of the Act is perplexing inasmuch as the amendment itself says nothing about de novo review and, in fact, mandates that appellate courts give "due deference" to a district court's "application of the guidelines to the facts." If Congress had intended for de novo review to apply, it would surely have said so in the Act. The language it did use mandates deferential, not de novo, review.

3. Institutional Advantages. The United States argues that de novo review has the institutional advantage of permitting the development of case law and the "distillation of general legal principles." U.S. Br. at 27. In fact, de novo review will inhibit the Sentencing Commission from making those judgments. The abuse-of-discretion standard permits the case law development of general legal principles, but has the advantage of giving the district courts sufficient flexibility to make departure determinations in widely varying factual contexts not suited, at least initially, for bright-line rules. Over time, the district courts' collective experience in making departure determinations under the Guidelines will allow

for general legal principles to emerge and for the Sentencing Commission to consider appropriate adjustments. *See Rivera*, 994 F.2d at 951. *See generally Pierce*, 487 U.S. at 561 (under the deferential review standard of Federal Rule of Procedure 39(b), "'[t]ime and experience have allowed the formless problem to take shape, and the contours of a guiding principle to emerge'") (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 663 (1971)).

De novo review would unnecessarily cut short the process by which new factors are considered by the district courts in a variety of factual contexts and then ultimately reviewed by the Commission in determining whether to revise the Guidelines. The practical effects of appellate courts' plenary review of sentencing departures would be to deprive the Commission of the information it needs to fulfill its statutory mission, thus displacing the Commission's statutory responsibility to formulate federal sentencing policy, and placing appellate courts in the awkward, time-consuming and highly inefficient position of micromanaging sentencing determinations. And, of course, with the availability of de novo appellate review in every case where the district court departs from the Guidelines, the party that lost below will have a strong incentive to appeal the sentence, further burdening the dockets of the courts of appeals.

Finally, historical practice confirms the institutional advantages of abuse-of-discretion review. This Court has long recognized that the district court, not the court of appeals, is best situated to make sentencing determinations, and the development of the Sentencing Guidelines "has not changed [this Court's] view" in this regard. *See Williams*, 503 U.S. at 203. The aggressive role proposed by the

United States for appellate courts, which is not "specifically directed by statute," *id.*, constitutes a radical break from this tradition that should be rejected.[3]

4. Statutory purposes. Petitioner agrees with the United States that one of the goals of Congress in enacting the Act was "eliminating unwarranted disparity in sentencing." U.S. Br. at 30. But Congress also explicitly directed that the Guidelines should "maintai[n] *sufficient flexibility to permit individualized sentences* when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B) (emphasis added). Congress did not want the district courts to apply the Guidelines "in a mechanistic fashion," but rather vested them with responsibility to consider all relevant factors and to depart from the Guidelines where necessary to ensure a fair and just punishment under the circumstances. *See* S. Rep. No. 225, *supra*, at 52, *reprinted in* 1984 U.S.C.C.A.N. at 3235.

The abuse-of-discretion standard effectuates the congressional goals of flexibility and individualized sentences by respecting the discretion of district courts to fashion sentences to reflect the unique circumstances of an unusual case, while at the same time providing a basis for striking down departures that are so clearly unwarranted

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[3] The United States argues that the institutional advantages of the de novo standard are demonstrated by cases in which appellate courts held that various factors could not be a valid basis for a departure. *See* U.S. Br. at 28-30. In most of the cited cases, however, the district court had refused to depart on the ground at issue; thus, there was no obvious benefit from plenary appellate review.

that they can be characterized as an abuse of the departure authority. The de novo standard, by contrast, undermines the Act's goals by intruding on an area of district court discretion that Congress sought to preserve and by requiring appellate courts to second-guess district court determinations based on the particular facts of every case presented to them.

B. The District Court Acted Well Within Its Discretion In Departing From The Guidelines In This Case

The United States is unable to point to any particular statute or Guidelines provision explicitly precluding the consideration of any of the factors relied upon by the district court to depart in this case. The district court's departure decisions are therefore only subject to review for abuse of discretion. Under that standard, the departures must be sustained because the district court reasonably concluded that a departure was warranted based upon the extraordinary circumstances of this case. Indeed, the United States does not deny that if the district court was legally authorized to consider the factors upon which it relied, the court acted within its discretion in determining to depart in this case. *See* U.S. Br. at 36-37 & n.11.

1. The 5-Level Departure. The United States offers two reasons why it believes that the district court's five-level departure for victim misconduct was improper. Neither provides justification for reversing the district court's departure on this ground.

First, the United States mischaracterizes the factual findings of the district court regarding the link between Mr. King's misbehavior and petitioner's conduct, and then argues that these findings do not, as a matter of law, warrant a departure under Guidelines § 5K2.10, p.s. According to the United States, "the district court found that King's unlawful conduct provoked only the initial use

of force, not the offense behavior." U.S. Br. at 43. The district court, however, did not simply make a finding of provocation of the initial use of force. It also quite explicitly found "that Mr. King's wrongful conduct contributed significantly to provoking the offense behavior," Pet. App. 121a — the precise grounds on which departure is permitted under § 5K2.10. *See* U.S.S.G. § 5K2.10, p.s. ("If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense.").[4] Moreover, as the United States does not dispute, the district court based its departure determination on each of the relevant factors under § 5K2.10, p.s. *See* Pet. Br. at 42 n.15. Thus, the United States is flatly wrong when it asserts that the district court did not make all the necessary findings for a departure under § 5K2.10, p.s. *See* U.S. Br. at 44.

The United States' second argument for reversing the victim misconduct departure is that "'[o]rdinary' victim misconduct does not fall outside the 'heartland' of the excessive force guideline, Guideline § 2H1.4." U.S. Br. at 44. This argument must be rejected for several reasons. First, the United States can only make this argument by advancing the curious proposition that "King engaged in ordinary, rather than unusual, misconduct." *Id.* at 47. The

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[4] To buttress its argument, the United States attempts to rewrite § 5K2.10, p.s. to require that "the wrongful conduct must actually 'provoke[] the offense behavior.'" U.S. Br. at 44. That Guideline, however, only requires that "the victim's wrongful conduct *contributed significantly to provoking* the offense behavior." U.S.S.G. § 5K2.10, p.s. (emphasis added).

United States fails to offer any cogent explanation as to why it is somehow "ordinary" for an individual, while "admittedly intoxicated," Pet. App. 121a, to drive "in excess of 100 m.p.h.," *id.* 97a, willfully elude three police vehicles for eight miles, *id.* 98a, and then, after finally being forced to stop, to refuse to obey police orders to step out of his car, *id.* 121a-122a, to "resist[] and bec[o]me combative," throwing off four police officers and "forcing . . . [them] to retreat," *id.* 122a, and to "charge towards" a police officer, *id.* 101a, shrugging off the electrical charge of two taser darts, while "attempt[ing] to escape from police custody," *id.* 122a.

But more fundamentally, the United States is not able to point to any statutory text or Guidelines provision, policy statement or commentary supporting its assertion that victim misconduct of the type encountered by petitioner falls within the "heartland" of the excessive force guideline, § 2H1.4. The best that the United States can do is to rely on *Graham* v. *Connor*, 490 U.S. 386 (1989) (*see* U.S. Br. at 44-45), and thirteen cases decided during the past twenty years that did not involve Guidelines departure issues (*see id.* at 44 n.14), to assert that "victim misconduct occurs in many excessive force cases, and is therefore within the heartland of that offense." *Id.* at 44. There is, of course, no basis in the Guidelines for concluding that Congress or the Commission viewed any of these cases as precluding victim misconduct as a basis for departure in excessive force cases.

At bottom, the United States' position rests not on any proper interpretation of a statute or Guidelines provision, but rather simply a policy argument that victim misconduct *should not* be a consideration in determining whether to depart from the Guidelines in excessive force cases. But that policy has not yet been enacted into law by Congress

or adopted as part of the Guidelines by the Commission, and federal appellate courts are not empowered to create a body of federal common law adopting and implementing any such policy.

2. The 3-Level Departure. The United States is also unable to point to any statute or Guidelines provision precluding consideration of any of the factors underlying the district court's 3-level departure. The United States' arguments are predicated on policy arguments that have no basis in any statutory or Guidelines text. The district court's 3-level departure was not an abuse of discretion.

a. In arguing that consideration of the successive prosecutions is improper, the United States relies on double jeopardy cases applying the dual sovereignty doctrine to argue that "there is . . . no legally cognizable unfairness in successive state and federal prosecutions." U.S. Br. at 41. That assertion squarely contradicts this Court's recognition that successive state and federal prosecutions, although not prohibited by the Double Jeopardy Clause, nevertheless implicate fundamental concerns of fairness. *See Rinaldi* v. *United States*, 434 U.S. 22, 28 (1977) (noting "the Court's continuing sensitivity to the fairness implications of the multiple prosecution power"); *id.* at 29 (noting that "but for the 'dual sovereignty' principle inherent in our federal system," the prohibition of successive state and federal prosecutions "would be embraced by the Double Jeopardy Clause"); *see also Bartkus* v. *Illinois*, 359 U.S. 121, 150 (1959) (Black, J., dissenting, joined by the Chief Justice and Douglas, J.) (arguing that the Double Jeopardy Clause precludes the state conviction of a defendant who had been acquitted of the same offense in the federal courts). The United States' argument also ignores the longstanding recognition under English law and the laws of many States, including California, that successive prosecution by two

sovereigns of the same conduct is improper. *See* Pet. Br. at 46.

The United States also argues that "reliance on a specter of unfairness in dual prosecutions is impermissible 'because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern.'" U.S. Br. at 42 (quoting Pet. App. 69a). Surely, however, the district court could reasonably conclude that the extraordinary public pressures that accompanied each prosecution, particularly the second one, after the acquittal and the riot, may be properly considered "to provide just punishment for the offense," 18 U.S.C. § 3553(a)(2), one of the explicit goals of sentencing under the Act. As the district court noted, the federal charges against petitioner involved the same central factual questions at issue in the state trial: "whether Defendants' conduct constituted a use of excessive force, and whether such use was intentional." Pet. App. 147a; *see also id.* 14a ("The ultimate issue in the [federal] case was . . . whether [the defendants] . . . willfully used unreasonable force."). In rendering a verdict of acquittal, the state jury necessarily decided these issues in favor of petitioner. He was prosecuted a second time only after an unprecedented community response and intense national pressure. Thus, contrary to what the United States asserts, *see* U.S. Br. at 42 n.13, petitioner's prior state court acquittal and the circumstance of his second prosecution were directly relevant to legitimate sentencing concerns such as fairness in punishment.

b. The United States argues that consideration of petitioner's heightened susceptibility to danger in prison is improper for two reasons. First, the United States maintains that it is "reasonable to infer that the Commission rejected unusual susceptibility to abuse in prison as a

ground for departure." U.S. Br. at 39. In support, the United States cites to 28 U.S.C. § 994(g), which "direct[s] the Commission to take into account the 'nature' of penal facilities in formulating the Sentencing Guidelines." U.S. Br. at 39. That statutory provision, however, does not pertain to sentencing departures, but rather to changes and expansion of prison facilities that may become necessary as a result of the Guidelines. *See* 28 U.S.C. § 994(g) (directing the Commission to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and to "make recommendations" concerning changes in such facilities and services that might be warranted as a result of the Guidelines). The United States also cites to Guidelines §§ 5H1.1 and 5H1.4, which allow departures based on a defendant's age or physical impairment, as evidence that the Commission did not intend for heightened susceptibility to danger in prison to be a departure consideration. However, neither of these Guidelines, nor any other Guidelines provision, expressly precludes consideration of this factor, and the logical inference is that the Commission intended to permit such consideration, given its direction that it did "*not* intend to limit the kinds of factors, *whether or not mentioned anywhere in the guidelines*, that could constitute grounds for departure in an unusual case." U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b) (emphasis added).[5] The Commission, of course, has the power to remove this factor as a consideration, but has not done so.

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[5] The district court found that petitioner's notoriety and unpopularity resulting from the widespread publicity and controversy surrounding this case, not his age or physical condition, made him a uniquely vulnerable target of violent behavior in prison. Pet. App. 125a.

The United States also contends that consideration of petitioner's safety in prison "is an entirely 'subjective' judgment" that would result in a "'virtually unlimited'" number of cases in which departure would be appropriate. U.S. Br. at 39. However, any objective review of the volatile, highly charged atmosphere and unprecedented level of actual and potential civil unrest surrounding petitioner's prosecutions would confirm that the circumstances of this case presented extraordinary concerns of prison safety for the defendant not present in other cases.[6]

c. The United States fails to cite any statutory or Guidelines provision precluding consideration of the administrative punishment of petitioner. Rather, the United States argues as a policy matter that departure on this ground would lead to a system of "boundless" sentencing considerations, leading to "unwarranted disparities in sentencing." U.S. Br. at 38. Yet, it can hardly be disputed that the extraordinary public pressure placed on the Los Angeles Police Department to punish Mr. Koon is unlikely to be replicated in many cases. Until the Commission decides otherwise, the Guidelines "retain enough flexibility" in these unique circumstances to permit downward departures based on consideration of the

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[6] Indeed, a recent attempt to kill petitioner at the halfway house where petitioner was incarcerated confirms the reasonableness of the district court's conclusion that petitioner is unusually susceptible to harm in prison. On November 23, 1995, Randall Tolbert "stormed a Riverside County halfway house . . . looking for . . . [Mr. Koon] but killed a hostage instead before sheriff's deputies shot him to death." Ralph Frammolino, *2 Die As Gunman Seeks Koon At Halfway House*, L.A. Times, Nov. 24, 1995, at A1.

additional punishment inflicted on Mr. Koon in other proceedings. *Cf. Witte* v. *United States*, 115 S. Ct. 2199, 2209 (1995).[7]

d. Whether or not the United States is correct that petitioner's unlikelihood of recidivism, standing alone, is an insufficient basis to depart from the Guidelines, U.S. Br. at 40, there is nothing in the Guidelines explicitly precluding a district court from taking this factor into account along with other factors in determining whether a departure is warranted. And, the United States cannot dispute that Congress mandated that district courts consider the likelihood of the defendant's future criminal activity in determining the appropriate sentence. *See* U.S.C. § 3553(a)(2)(C).

CONCLUSION

The court of appeals' decision will put sentencing judges in straitjackets and will transfer the Sentencing Commission's responsibilities for sentencing policy to the appellate courts and, ultimately, to this Court. Congress did not provide for or intend such a result.

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[7] The United States asserts, as did the court below, that a departure based upon consideration of petitioner's administrative punishment may be based "'consciously or unconsciously' (Pet. App. 63a), . . . on socio-economic status, a factor that is never permissible to consider." U.S. Br. at 38. That statement is wholly unwarranted. There is nothing in the record suggesting that petitioner's socio-economic status played any role in the district court's departure determination in this case, and the United States' apparent suggestion that petitioner's status as a law enforcement officer should somehow limit the district court's ability to consider administrative punishment finds no support in any statute or Guidelines provision.

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